

Libya and International Refugee and Asylum Law: Addressing the Protection of Refugees and Migrants Displaced by the 2011 Conflict

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Abstract

This article analyses the effects of the Libyan uprising on migrants and refugees in Libya during the conflict. Particular focus is paid to how *de facto* gaps in the international legal system hinder the right to protection to which forcibly displaced migrants are entitled. It is argued that the current implementation of a European migration policy based on restricting access to European Union (EU) territory and on re-instating previous cooperation on migration with Libya further undermines the security and well-being of those who escaped the war.

Introduction

This article aims to assess the implications of the 2011 Libyan uprising on migrants and refugees forcibly displaced by the conflict. In the aftermath of the Libyan crisis, the humanitarian needs of displaced economic migrants, rejected or unregistered refugees and de-classified forced migrants have been largely overlooked. It is argued that the legal status of displaced third country nationals is uncertain given the *de facto* gaps in the international legal framework for their protection. The implementation of EU migration policies aimed at keeping migrants and refugees outside European borders further limits the right to protection to which people fleeing war are entitled.

Starting with an overview of the Libyan conflict, the article goes onto differentiate between different migrant categories displaced by the conflict and to delineate the *de facto* gaps in their protection present in the international legal system. Given that Libya is not the country of origin for these forced migrants, many are unable to claim asylum under Article 1A of the 1951 Convention Relating to the Status of Refugees (the Convention). Despite the Organisation of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa's (OAU Convention) extension of refugee protection to people escaping a situation of conflict in their country of residence, this provision is restricted to asylum seekers within African states.

The article then goes on to assess the response of the EU and its member states to the forced displacement of people from Libya. It is argued that, notwithstanding the calls for help on behalf of people trapped in the conflict, the EU and its member states are implementing a migration policy based on the rejection of refugees and migrants arriving to Europe. A great number of those displaced have fled to Tunisia and Egypt, whilst Europe has received only a minority of them. In an attempt to minimise migration to Europe, the EU has re-instated previous cooperation on migration with Libya, at the expense of those genuinely in need of international protection and in breach of the principle of *non-refoulement*. Despite the restrictions within the refugee and asylum legal system undermining their right to protection, many third country nationals fleeing the violence of the Libyan conflict may be fully eligible to safety under a number of international and regional human rights instruments, to which EU member states are party.

The Libyan Uprising: Context and its Implications for Refugees and Migrants

The Libyan uprising, initiated with a series of demonstrations against political corruption and housing shortages, was brought to public attention on 15 February 2011 when widespread protests erupted against the 42 year dictatorship of Colonel Gaddafi, including violent clashes between pro- and anti-Gaddafi forces (Fiddian-Qasmiyeh 2011; Mawinwaring 2011). A number of insurgents took control of the city of Benghazi and established the National Transitional Council, calling for the end of Gaddafi's rule and the holding of democratic elections. Both nationals and non-nationals have been displaced by the war and an estimated number of 150,000 people of different nationalities were evacuated by the International Organisation for Migration (IOM) by 30 June 2011 (Dominguez and Pitt-Rashid 2012: 2).

Prior to the conflict in 2011, Libya hosted between 1.5 million and 2.5 million foreign nationals, mainly from Burkina Faso, Chad, Côte D'Ivoire, Egypt, Eritrea, Ethiopia, Ghana, Iraq, Mali, Niger, Nigeria, Somalia, Sudan and Tunisia (Amnesty International 2011b; Koser 2012). Many non-nationals on Libyan soil have been living with threats to their freedom, fearing arrest and detention on migration-related grounds since before the war and the conflict has only heightened pre-existing racial tensions against them (Amnesty International 2011a; 2011d). Migrants and refugees from Sub-Saharan Africa in particular – accused by some citizens and anti-Gaddafi fighters of being mercenaries paid by the regime – have been subjected to arbitrary detention, torture and even death (Amnesty International 2011c; 2011d).

As a result of this persecution and continued violence, 612,872 (or 96.6% of all) third country nationals fled Libya between February and July 2011 and sought refugee status in neighbouring countries (Mawinwaring 2011: 443). A number of migrants and refugees are currently stranded in refugee transit camps in Ras Djir in Tunisia or at the Saloum Border Post in Egypt where they endure hard living conditions, gathered in makeshift tents in isolated areas (UNHCR 2011a). At the time of writing, 1,600 people of concern to the United Nations High Commissioner for Refugees (UNHCR) are at the Saloum Border Post and 1,470 asylum seekers and more than 2,230 refugees reside in the Ras Djir camp (UNHCR 2012b; 2012c). Most cannot return home for fear of persecution. Others are returning to Libya where they could once more be the target of attacks (UNHCR 2012a).

Of those who have made a desperate attempt to cross the Mediterranean Sea, only 20,659 people (or approximately 3.4%) have managed to land in Italy and Malta (Mawinwaring 2011: 443) and a reported 2,352 people have died during the sea crossing in 2011 (Fortress Europe 2012).

Forced Displacement from Libya: Migrant Categories and Gaps for Protection

Libya is not party to the Convention and has not ratified the Rome Statute of the International Criminal Court. Furthermore, since 2010, Libya has not allowed UNHCR to have a presence on its soil. Despite being a party to the OAU Convention, Libya still lacks a national system for the registration of asylum seekers and the recognition of refugees, as well as a mechanism to monitor and protect those at risk of being forcibly returned to their country (European Parliament 2011). As a result, the responsibility to register refugees has rested with UNHCR in Libya, which – prior to the conflict – managed to register 3,000 asylum seekers and 8,000 refugees. Many others, however, have not had their right to receive international protection formally recognised (Fiddian-Qasmiyeh 2011).

In addition to denying refugee status to thousands of individuals fleeing persecution in their home country, Libya has thus far categorised many internationally recognised refugees, including Sahrawis and Palestinians, as voluntary migrants on its territory for work or educational reasons. There is therefore a high risk that many refugees on Libyan soil were falsely labelled as economic migrants prior to being once again displaced by the conflict (Fiddian-Qasmiyeh 2011).

The Libyan conflict has brought together multiple forms of migration and has revealed the blurred nature of different migrant categories fleeing the war. The broader context of Libyan displacement includes not only recognised refugees, but also rejected or unregistered refugees and de-classified refugees who have been labelled voluntary or economic migrants. Displacement from Libya further includes migrant workers from across the South East, East and Central Asia, North and sub-Saharan Africa and the Middle East (Fiddian-Qasmiyeh 2011).

The legal status of displaced economic migrants outside Libya, including rejected, unregistered and de-classified refugees, is uncertain given the *de facto* gaps in the international legal framework for their protection. Despite their evident protection and humanitarian needs, third country nationals who fled the Libyan war do not fall under the technical definition of the refugee given by the Convention (Ambroso 2012).

Article 1A of the Convention articulates that refugee protection shall be conferred to individuals who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is *outside the country of his nationality*, and is unable to or, owing to such fear, is unwilling to avail himself of the *protection of that country*’ (emphasis added). Economic migrants who have crossed the Libyan border are, hence, not legally entitled to refugee protection which is based on circumstances in their country of origin. Furthermore, displaced economic migrants who fled the Libyan conflict may not fall under the narrow definition of the refugee set in the Convention if they are unable to prove the connection between the risk of harm stemming from the conflict and one of the above stated grounds of persecution (Ambroso 2012).

Article 1(2) of the OAU Convention extends refugee protection to ‘*every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence* in order to seek refuge in another place outside his country of origin or nationality’ (emphasis added). The OAU Convention, however, imposes protection obligations merely on African states (Tunisia and Egypt are state party to this Convention) and therefore does not protect those asylum seekers who fled to Europe. Furthermore, the OAU Convention does not provide for durable solutions such as resettlement, which is available to refugees covered by the Convention (Wood 2012).

The above gaps show the inability of current international refugee law to fully grant protection to intersecting migrant/refugee categories in conflict situations. The result is the absence of clear institutional responsibility for the safeguarding of migrant workers as well as rejected, unregistered and de-classified refugees outside Libya (Fiddian-Qasmiyeh 2011; Koser 2012). Recognising these protection gaps and the existence of overlapping categories is essential to determine and to fulfil the humanitarian needs of migrants displaced by the Libyan conflict.

European Responses to Libya's Forced Migrants

The aforementioned protection gaps are exacerbated by the migration policies currently exercised by the EU and its member states. Whilst calling for democracy in North Africa, including through a no-fly zone established to protect civilians and support insurgents against the Libyan dictatorial government, EU member states rejected part of that population displaced

by the Libyan war seeking protection in Europe (Dominguez and Pitt-Rashid 2012; Koser 2012). The majority of those fleeing Libya, around half a million migrants and asylum seekers and half a million nationals, have been admitted by Tunisia and Egypt (Mainwaring 2011; Koser, 2012) which have allowed the IOM and UNHCR to set up transit camps to carry out the refugee status determination process and make referrals for resettlement (Ambroso 2012).

The Libyan conflict has prompted discussion among EU member states on hypothetical large numbers of displaced populations crossing the Mediterranean Sea. The EU has immediately stressed the importance of responsibility sharing among EU countries, including the adoption of a flexible approach to family reunification and to the Dublin Regulation, providing for the transfer of an asylum seeker to the Member State first entered in Europe (UNHCR 2011b). The EU has also called upon its North Western countries to refrain from returning asylum seekers to EU frontier states to alleviate the pressure posed on them (UNHCR 2011b). Malta has requested the implementation of a temporary protection mechanism in the event of mass influx. Similarly, Italy, Spain, Malta, France and Cyprus have called on other EU member states to resettle those landing to Southern European shores (Mainwaring 2011).

Despite this rhetoric, many migrants and asylum seekers have been denied access to Europe. As of early 2012, for instance, EU member states have offered resettlement to only 600 refugees and have not increased their resettlement quotas to accommodate refugees hosted by Tunisia and Egypt (Ambroso 2012; Garlick and Van Selm 2012).

Most strikingly, the EU has reinforced its old frontiers management system to counter the arrival of around 45,000 boat people, including through its border agency, Frontex (Koser, 2012). While repeatedly expressing their commitment to democracy and human rights, the EU and Frontex have violated the principle of *non-refoulement* by preventing people from landing on EU shores, where they could have applied for asylum, and by returning migrants and asylum seekers to countries where they could face persecution, including Libya (Perkowski 2012: 26, 28-29).

In order to prevent the arrival of people displaced by the North African political turmoil, the EU advocated for the resumption of the EU/Libya Framework Agreement¹ in November 2011 (Malta Independent 2011). Regardless of the ongoing violations of human rights standards in Libya, in April 2012 Italy also signed a new agreement on migration control, shaped on the model provided by previous cooperation and based on the absence of rules for the safeguarding of refugees and asylum seekers² (Andrijasevic 2006; Amnesty International 2012). The agreement has been ratified despite the Italian commitment to implement the verdict of the case *Hirsi Jamaa and Others v. Italy*, whereby in February 2012 the Grand Chamber of the European Court of Human Rights condemned Italy for its practice of push-backs of boats to Libya and the infringement of the principle of *non-refoulement* (Amnesty International 2012).

Both the Convention (Article 33) and the OAU Convention (Article 2) prohibit the 'return ("*refouler*") of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion' (Ambroso 2012). Although not technically eligible for asylum under the Convention and the OAU Convention, third country nationals escaping to Europe from Libya have a number of rights under international human rights law including, for

¹ In 2010 the EU signed the EU/Libya Framework Agreement, providing for political dialogue and cooperation with Libya on foreign policy and security issues and in areas such as maritime policy, migration, visa, etc. (European Union 2008).

² The 2008 Treaty on Friendship, Partnership and Cooperation between Italy and Libya outlines the rules for the fight against irregular immigration through the control of Libyan borders and the interception and return of migrants and asylum seekers to Libya (Andrijasevic 2006: 11-13, 2009: 26; Ronziti 2009: 6).

instance, Article 3(1) of the Convention Against Torture (CAT) which states that, ‘No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. At a regional level, the scope of protection is even broader: Article 19 of the Charter of Fundamental Rights of the European Union (CFREU) stipulates that ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. The European Convention on Human Rights and Fundamental Freedoms (ECHR) also offers protection under Articles 3 and 13.³

Conclusion

This article has sought to demonstrate the protection gaps that have emerged in the aftermath of the Libyan uprising for third country nationals on Libyan soil during the war. Not a party to the Convention, Libya has a long history of denying protection to refugees and asylum seekers. Many third country nationals in Libya have found themselves falsely categorised as economic migrants, together with numbers of rejected and unrecognised refugees – a label they have carried with them when fleeing the recent civil war. Caught in the conflict, large numbers of migrants and asylum seekers have been forced to flee and are currently stuck in a legal limbo. For migrant workers, rejected or unregistered asylum seekers and declassified refugees whose countries of origin are not Libya, Article 1A of the Convention offers no protection. Whilst a broader scope for protection is offered by the OAU Convention, this has a legally binding obligation only on African states who are party to it. A crucial consequence of these legal pitfalls has been the inability to access the international protection to which Convention refugees are entitled.

The migration policies currently implemented by EU member states further undermine the right to protection to which third country nationals escaping the Libyan conflict are entitled. Despite calls for democracy in Libya to ensure the rights of nationals and non-nationals alike, as well as calls for cooperation on the management of new migration flows and the provision of protection, the EU has restricted access to its territory and rejected numbers of those fleeing the war. New forms of collaboration on migration with Libya are also being implemented despite its violations of human rights standards. At the time of writing Libya does not yet have a functioning democratic system or asylum and migration systems and procedures. The EU and Italy have, however, reinstated previous cooperation on migration, at the expense of the right to apply for asylum of those genuinely in need of international protection and in violation of the principle of *non-refoulement*. If not technically eligible for protection under the Convention and the OAU Convention, displaced third country nationals in search of protection in Europe are fully entitled to safety under a number of international human rights conventions to which EU member states are bound.

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³ Article 3 of the ECHR states ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Article 13 of the ECHR, provides that ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’ (ECHR 2002).

people since 1975 and has worked and consulted with several research institutions and NGOs in the area of human rights.

References Cited

AMBROSO, G. (2012) 'Bordering On a Crisis', *Forced Migration Review*, 39: 6-7.

AMNESTY INTERNATIONAL (2011a) *Europe, Now It Is Your Turn to Act: Refugees Forced Out of Libya Urgently Need Resettlement*, London, Amnesty International Publications.

_____ (2011b) 'North Africa's Refugees Suffer Pattern of Displacement'. Available from: <<http://www.amnesty.org/en/news-and-updates/north-africa%E2%80%99s-refugees-suffer-pattern-displacement-2011-09-20>> (accessed on 24 March 2012).

_____ (2011c) 'Tunisia Must Stop Returning Asylum-Seekers to Libya'. Available from: <www.amnesty.org/en/news/tunisia-must-stop-returning-asylum-seekers-libya-2011-12-14> (accessed 24 March 2012).

_____ (2011d) *Wire: Europe Fails Refugees Fleeing Libya*, Amnesty International Publications, United Kingdom.

_____ (2012) 'Italy Must Sink Agreement with Libya on Migration Control'. Available from: <www.amnesty.org/en/appeals-for-action/italy-migration-control> (accessed on 22 June 2012).

ANDRIJASEVIC, R. (2006) 'How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya', Centre on Migration, Policy and Society (COMPAS), University of Oxford, WP-06-27: 1-44.

DOMINGUEZ, A.M. and **PITT-RASHID, T.** (2012) 'International Intervention and Its Humanitarian Consequences in Libya and Beyond: An Unresolved Issue'. Available from: <<http://www.opendemocracy.net/alvaro-mellado-dominguez-tom-pitt-rashid/international-intervention-and-its-humanitarian-consequence>> (accessed 7 September 2011).

EUROPEAN PARLIAMENT (2011) 'Text Adopted - Thursday, 20 January 2011 - EU-Libya Framework Agreement'. Available from: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0020+0+DOC+XML+V0//EN> (accessed on 12 April 2011).

EUROPEAN UNION (2008) 'EU-Libya: Negotiations on Future Framework Agreement Start'. Available from: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1687&format=HTML&aged=0&language=EN&guiLanguage=en>> (accessed on 5 September 2011).

FORTRESS EUROPE (2012) 'La Strage'. Available from: <<http://fortresseurope.blogspot.co.uk/p/la-strage.html>> (accessed on 20 September 2012).

FIDDIAN-QASMIYEH, E. (2012) 'Invisible Refugees: Protecting Sahrawis and Palestinians Displaced by the 2011 Libyan Uprising', *International Journal of Refugee Law*, 24(2): 263-293.

GARLICK, M. and **VAN SELM, J.** (2012) 'From Commitment to Practice: the EU Response', *Forced Migration Review*, 39: 20-22.

KOSER, K. (2012) 'Migration, Displacement and the Arab Spring: Lessons to Learn', The Brookings Institution. Available from: < www.brookings.edu/opinions/2012/0322_arab_spring_migration_koser.aspx (accessed on 15 April 2012).

MAINWARING, C. (2011) 'In the Face of Revolution: the Libyan Civil War and Migration Politics in Southern Europe', 431-451 in Calleya, S., Lutterbeck, D., Wohlfeld, M. and Grech, O, (eds.), *The EU and Political Change in Neighbouring Regions: Lessons for EU's Interaction with the Southern Mediterranean*, Malta, University of Malta Press.

MALTA INDEPENDENT (2011) 'Commission Hopes Migration Discussion with New Libya to Start 'As Soon As Possible''. Available from: <<http://www.independent.com.mt/news.asp?newsitemid=134888>> (accessed on 21 September 2012).

PERKOWSKI, N. (2012) 'A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex', Refugee Studies Centre, University of Oxford, WP-81: 1-46.

RONZITI, N. (2012) 'Il Futuro dei Trattati tra Italia e Libia'. Available from: <www.affarinternazionali.it/articolo.asp?ID=1961> (accessed 27 March 2012).

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) (2011a) 'Away Alone: Unaccompanied Children Find Shelter after Fleeing Libya'. Available from: <www.unhcr.org/4e0099c79d.html> (accessed on 23 March 2012).

_____ (2011b) 'Responsibility Sharing For Relocation and Resettlement of those Fleeing Libya'. Available from: <www.unhcr.org.uk/resources/monthly-updates/may-2011/resettlement-and-relocation.html> (accessed on 23 March 2012).

_____ (2012a) 'Q&A: Fresh Challenges in Libya for an Expanded UNHCR Team'. Available from: <www.unhcr.org/4f637acc6.html> (accessed on 27 March 2012).

_____ (2012b) '2012 UNHCR Country Operations Profile – Egypt'. Available from: <<http://www.unhcr.org/pages/49e486356.html>> (accessed on 24 September 2012).

_____ (2012c) '2012 UNHCR Country Operations Profile – Tunisia'. Available from: <<http://www.unhcr.org/pages/49e486166.html>> (accessed on 24 September 2012).

WOOD, T. (2012) 'Legal Protection Frameworks', *Forced Migration Review*, **39**: 8-9.

Legal Instruments:

1950 European Convention on Human Rights and Fundamental Freedoms

1951 Convention Relating to the Status of Refugees

1969 Convention Governing the Specific Aspects of Refugee Problems in Africa

1984 Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

2010 Charter of Fundamental Rights of the European Union